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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-218

DOUGLAS B. FUGATE, Commissioner,
Department of Highways,
Commonwealth of Virginia,

Petitioner

v.

ARLINGTON COALITION ON
TRANSPORTATION, et al.,

Respondents

ON PEITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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The petition for certiorari and the memorandum filed by the Solicitor General adequately set forth the nature of the case and the questions presented by the petition.

REASONS FOR DENYING THE WRIT

The decision of the court below was correct and does not warrant review by this Court.

1. *Laches.* Petitioner erroneously asserts that the court of appeals held the defense of laches may never be asserted in "ecology cases". In fact the court decided only that while this action might have been brought about a year earlier the public interest in preserving the environment (and, we may add, in ensuring that public officials observe the laws adopted by the Congress) led it to reject the defense. This was no more than a familiar instance of a court of equity refusing to apply an equitable defense where other public interest considerations suggested the desirability that the case be decided on the merits. Laches "varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule," *Halstead v. Grinnan*, 152 U.S. 412, 417 (1894). Whether the court below correctly exercised its discretion in this regard hardly deserves the attention of this Court.

2. *The National Environmental Policy Act Statement and the "Parkland" Determination.* The allegations of the complaint that the defendants were proceeding unlawfully toward the construction of the highway without filing the impact statement required by Section 102(c) of the National Environment Policy Act of 1969, 42 U.S.C. 4332(c) and without making the necessary findings that must precede the use of parkland for Federal highway purposes required by Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 1653(f), were met by the announcement of the respondents that while they believed the statutes to be inapplicable, they would nevertheless comply with these

provisions. The determination of the court of appeals that compliance with these statutes was obligatory thus had only very limited practical effect. We agree with the Solicitor General that the application of these statutes by the court below to projects begun but not completed is not appreciably different from how they have been applied by other courts of appeals, although we disagree with his characterization of the formulation of the applicable principles by the court as vague and potentially troublesome. But even if the articulation of the governing principles might be a matter of sufficient importance to warrant consideration by this Court it should await presentation in a case in which the decision will affect the parties in a more concrete way.

3. *Public Hearings.* The petition asserts that the ground on which the court of appeals ordered that a new public hearing must be held pursuant to Section 128 of the Federal Aid Highway Act, 28 U.S.C. 128, was incorrect. While we can hardly deny that the issue is an important one, this case is not a good one for its resolution. As the Solicitor General points out the original Section 128 hearing was held in 1958 and although highways are not constructed in a week's time, a delay of 14 years before any construction begins is extraordinary. The statutory scheme contemplates not just a hearing but one that is meaningful and the anticipated impact in 1958 of a projected highway through a rapidly changing urban community relates only remotely to the actual impact in 1972. Review by this Court would be likely to involve consideration of alternative grounds to support the decision below to at least as great an extent as the grounds relied upon by the court of appeals. This appears also to be the view of the

Solicitor General and his memorandum states explicitly that the Department of Transportation will require compliance with the decision below. This would seem to eliminate any purpose of review by this Court.

Respectfully submitted,

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